

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 24, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 98-1-M
	:	A.C. No. 13-01916-05505
KNOCK'S BUILDING SUPPLIES	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 1, 1999, the Commission received from Knock's Building Supplies ("KBS") a request to reopen a decision issued by Administrative Law Judge T. Todd Hodgdon on May 29, 1998. In its request for relief, KBS demands a jury trial and alleges that "a prejudicial error of procedure was committed." K. Mot. The operator also claims to have more knowledge of safety than MSHA's inspectors, and submits that it has never had a serious injury. *Id.* In opposition to KBS's request, the Secretary argues that the operator's request does not establish grounds upon which the Commission could grant relief under Fed. R. Civ. P. 60(b)(1) or 60(b)(6). S. Opp'n at 4-5.

The judge's jurisdiction over these cases terminated when his decision was issued on May 29. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1).

The Commission has entertained late-filed petitions for discretionary review where good cause has been shown. *See, e.g., De Atley Co.*, 18 FMSHRC 491, 492 (Apr. 1996) (excusing late filing of petition for discretionary review where operator's predecessor failed to inform operator of unconsummated settlement agreement). Typically, in such cases, a default order has been entered against a party, depriving the party of any opportunity to defend against the enforcement action taken by the Secretary. Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable

neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply “so far as practicable” in the absence of applicable Commission rules); *see, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). Rule 60(b) motions are committed to the sound discretion of the judicial tribunal in which relief is sought. *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); *see Green Coal Co.*, 18 FMSHRC 1594, 1595 (Sept. 1996).

Here, KBS has availed itself of the opportunity to defend the case before a judge. The operator offers no explanation for its failure to timely submit a petition for discretionary review. Thus, KBS has failed to set forth grounds establishing that Fed. R. Civ. P. 60(b) relief is appropriate. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief); *Brown Bros. Sand Co.*, 15 FMSHRC 203, 204 (Feb. 1993) (rejecting late-filed petition for discretionary review of judge’s decision where stated rationale did not meet the criteria of Fed. R. Civ. P. 60(b)). Accordingly, KBS’s request for relief from the final Commission decision is denied.

For the foregoing reasons, the operator's motion is denied.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Markley Knock
Knock's Building Supplies
302 North Side
Parkersburg, IA 50665

Jack Powasnik, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge T. Todd Hodgdon
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041